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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 122

CLIFTON MALONEY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ANNIE W. CHIEVES, DECEASED, ET AL.,
Petitioners,

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

ROBERT F. COGSWELL,
Counsel for Petitioners.

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Petitioners,

vs.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Clifton Maloney, as Executor aforesaid, and Hubert A. Spangler, Executor and Trustee under the will of Mary E. Graff, deceased, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia reversing the decision of the District Court of the United States for the District of Columbia in favor of your petitioners and against the respondent herein.

Jurisdiction.

The judgment of the said Court of Appeals was entered March 6, 1944 (R. 40). Jurisdiction is invoked under Section 240 of the Judicial Code, As Amended, 28 U. S. C. 347.

Summary Statement of Matter Involved.

Inez Walsh Fulton, a resident of the District of Columbia, died in said District on the twelfth day of June, 1939. She left a will dated July 3, 1933. By a codicil dated May 11, 1936, she appointed the American Security and Trust Company of Washington, D. C., as Executor. Both will and codicil were duly admitted to probate and record. The codicil made no change in the will other than to appoint the Trust Company as Executor in the place and stead of Mary E. Graff, a sister, then living. Annie W. Chieves, a sister, was also living at the time. The will and codicil read as follows:

"July 3, 1933.

I, Inez Walsh Fulton, being of sound mind, do declare this to be my last will and testament.

To my sisters, Mary E. Graff, 4913 Monument Road, North Wynnefield, Philadelphia, Pa. and Annie W. Chieves, 1657-31st Street, Washington, D. C., I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts.

St. Matthews P. E. Church, Francisville, Philadelphia, Pa. (five hundred)	$500.00
Grenfell Mission, Labrador (two hundred & fifty)	250.00
Home for Incurables, Washington, D. C. (one hundred)	100.00

My body is to be cremated, and the ashes buried in my lot in Laurel Hill Cemetery, Philadelphia, Pa., and a plain granite stone with my name only —

The casket must be very inexpensive, and nothing but a simple service.

Mary E. Graff

4913 Monument Road, Phila, Pa. is to be appointed executrix to serve without bond.

If she should die before I do, Annie W. Chieves will be the executrix without bond.

(Revoked by codicil of May 11-1936.

INEZ W. FULTON.)

After the death of Mary E. Graff, and Annie W. Chieves, the estate is to be placed in the City Trust of Philadelphia, Pa. which has charge of the funds of Girard College; — to purchase a scholarship in the Medical School, Jefferson College, for a Protestant graduate of Girard College, *at graduation*, who has an excellent record during his entire period of residence in Girard College, for character and scholarship.

The training in Jefferson College is to be in general medicine—as I feel there is needed good practitioners, not specialists.

No course in Jefferson College must be granted for longer than four years.

If the lad does not do good work, and have excellent reports, he must be dropped, and the advantage given to another Girard College graduate.

During the Jefferson College *sessions, the student may be allowed $30 a month, should the City Trust find that amount available;—less if not.

Should the estate in the future, allow enough for an additional student, the Board of City Trust is authorized to extend the benefaction at their discretion.

The scholarship is to be called "The Inez Walsh Fulton Scholarship".

INEZ WALSH FULTON.
July 3—1933.

Witnesses	addresses
ROBERT B. SCOTT	(American Security
ADAM H. GADDIS	& Trust Co.
W. H. KELLEY	Washington, D. C.)

Codicil to the will of Inez W. Fulton made and attested on July 3—1933—

This eleventh day of May 1936 I revoke the item in my will of July 3—1933 making my executor Mary E. Graff 4913 Monument Road, Philadelphia, Pa. and in

---

* This means that during vacation no $30 is to be allowed.

her place I appoint as executor, The American Security & Trust Co., 15th & Penn. Ave., Washington, D. C.

1657—31st,
May 11—1936.

Witness—GEORGE B. WILLIAMS, 1009 9th St. N.E.
W. H. KELLEY 127
J. W. LYON"

Following the death of testatrix the Trust Company as Executor filed an action in the District Court of the United States for the District of Columbia to construe the will, stating that it had a doubt as to whether the gift to the sisters was one of an absolute estate or of a life estate only, and if the latter, to whom and in what proportions and amounts it should deliver such net distributable assets.

The Trust Company as Executor took no part in the argument in the trial court, acting as a stake-holder, and was not a party to the proceedings in the Court of Appeals.

Testatrix predeceased both of her sisters. They executed wills subsequent to the death of their sister. Mary E. Graff made several bequests, one to the Wynnefield United Presbyterian Church, Philadelphia, Pa., in the sum of $500, one to St. Matthews Protestant Episcopal Church, Francisville, Philadelphia, in the amount of $1,000, one to a Reverend Hugh Newlands in the amount of $250, several to friends, and the remainder to Hubert A. Spangler in trust to pay monthly to Annie W. Chieves $200 and upon her death the residue to him, a life long friend of the testatrix and her family, and one of the petitioners herein.

Annie W. Chieves left a will, probated in the District Court of the United States for the District of Columbia, devising her entire estate, with the exception of a few personal belongings to a nephew, to the following charities, in varying amounts: Specific legacy of $1,000 to an old servant; $1,000 to the Loudon Hospital at Leesburg, Virginia;

$1,000 to the Women's Home Missionary Society of the Methodist Episcopal Church; $1,000 to Women's Foreign Missionary Society of the Methodist Episcopal Church, and to the following the entire residue: Foundry Methodist Episcopal Church, Washington, D. C.; Sibley Memorial Hospital, Washington, D. C.; Washington Home for Incurables, Washington, D. C.; Methodist Home, Washington, D. C.; Methodist Home for the Aged, Philadelphia; Home for the Aged and Orphans, Baltimore Conference, Methodist Episcopal Church, South, Inc., Gaithersburg, Md.; Children's Home Society of Virginia, Richmond, Va.; Swartzell Methodist Home for Children, Washington, D. C.; Grenfell Association of America, New York City; Crossnore School, Crossnore, N. C.; Asbury College, Wilmore, Kentucky; Society for Improvement of the Condition of the Poor, New York City, and Fund for the Aid of Superannuated Preachers of the Methodist Episcopal Church, Baltimore, Maryland.

In the trial court the respondent claimed that the will conveyed a life estate only to the two sisters, or upon the death of either one of them, one-half the estate and that said estate could not, by the sisters or either of them, be disposed of by will or otherwise (R. 20).

Petitioners contended that the will conveyed an absolute estate to the two sisters and that the provisions as to the Board of City Trusts was an attempted limitation of a remainder over following two vested and absolute estates in the sisters and was invalid and void (R. 15). The trial court sustained this contention.

Respondent appealed from the judgment of the trial court and alleged that the will bequeathed to the two sisters life estates only with power to consume the principal during their lives with remainder over to respondent in trust. The court below reversed the trial court, holding that the will conveyed a life estate only to the two sisters.

Specification of Error to Be Urged.

The Court of Appeals erred:

1. In reversing the judgment of the lower court.

2. In predicating its reversal on a misapplication or total disregard of the meaning and intent of the word "unconditionally" in relation to the bequest to the two sisters.

3. In predicating its reversal on the erroneous conclusion that the trial court did not correctly apply applicable rules in considering the whole instrument for the purpose of determining the true intent of testatrix and in failing to take into account that the intent of the latter paragraph was to create a charitable trust in no way dependent upon the power or pleasure of the two sisters.

4. In holding that the attempted trust was a major project in the mind of testatrix, greater than the primary object to convey to her two sisters "unconditionally, all that I own and possess,"

5. In holding that despite the unconditional bequest it was not necessary to decide what the extent of power of the sisters may have been over the property during their respective lives as they are deceased and the estate remains undistributed.

6. In holding that the will must be interpreted "that her sisters should enjoy the property only so long as they lived" with remainder over to the respondent.

7. In holding that the intent of the testatrix to establish a charitable trust should prevail "over her inept use of words to describe her bequest to the sisters."

Reasons for Granting the Writ.

This case presents a matter of sufficient general importance in the construction of wills to merit a review by this

Court. The action of the Court of Appeals in reversing the judgment of the trial court is directly contrary to the great weight of authority; in conflict with applicable decisions of this Court, in conflict with its own decisions, and based upon an erroneous construction of the will of decedent.

No words can be found which will convey an absolute estate, all personal property, with greater clarity than to "bequeath" to one "unconditionally, all that I own and possess". This phrase is found in the second paragraph of her will. Made part of the same sentence is the clause "asking them to make the following gifts". Following the word "gifts" is a period, not a comma. Immediately following are three gifts. To St. Matthews P. E. Church, Francisville, Philadelphia, Pa. (five hundred) $500. Grenfell Mission, Labrador (two hundred & fifty) 250.00. Home for Incurables, Washington, D. C. (one hundred) 100.00. Next she states that her body is to be cremated, where and how the ashes are to be buried—that the casket must be very inexpensive, and nothing but a simple service. Then follows the appointment of her sister Mary E. Graff as executrix to serve without bond and in the event that she should die before testatrix, her sister Annie W. Chieves "will be the executrix" without bond. Following this, she states that "after the death of Mary E. Graff, and Annie W. Chieves, the estate is to be placed in the City Trust of Philadelphia, Pa., which has charge of the funds of Girard College;—to purchase a scholarship in the Medical School, Jefferson College, for a Protestant graduate of Girard College, at graduation, who has an excellent record during his entire period of residence in Girard College, for character and scholarship. * * *"

In the trial court, as above stated, respondent claimed that the will conveyed a life estate only to the sisters, and one which could not be disposed of by will or otherwise,

viz., that the language is to be construed as exhibiting the intention of testatrix to bequeath a mere life estate with its usual legal incidents to the two sisters, with remainder over. In the court below this issue was broadened by respondent by contending that during the lives of the sisters they would have the free and unrestricted use not only of the income but also of the principal with power to consume the same without incurring liability for waste.

Petitioners contended in both of the lower courts, as they contend here, that the testatrix in "bequeathing" to her sisters "unconditionally, all that I own and possess, asking them to make the following gifts." conveyed to them an absolute estate and that the attempted limitation over following an absolute estate to the first takers, her sisters, was null and void.

Opinion Below.

The trial court did not write an opinion. The hearing was stenographically reported. Judgment of the trial court is found at page 40 of the record. The opinion of the United States Court of Appeals for the District of Columbia is found at page 37 of the record. It is reported in Adv. Sheets No. 3, 141 F. (2) 275, May 8, 1944.

ARGUMENT.

The Court of Appeals Has Rendered a Decision in Conflict With Decisions of This Court.

In *Howard* v. *Carusi*, 109 U. S. 725, this court held that

> "The rule is well established that, although generally an estate may be devised to one in fee simple or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void."

Lewis Carusi in his will provided that all his property, real, personal and mixed, after his debts, funeral expenses, etc., were paid,

> "I give devise and bequeath the same to my brother Samuel Carusi, to be held, used and enjoyed by him, his heirs, executors, administrators and assigns, forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same or so much thereof, as he, the said Samuel Carusi shall not have disposed of by devise or sale, shall descend to my three beloved nieces, the daughters of my said brother, Samuel Carusi, as follows;" * * *

This court said:

> "The question is, therefore, what estate did the testator intend to give the complainant by his will of March 18th, 1872?
>
> This will gives, first an estate in fee simple to Samuel Carusi; it contains, second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee simple, with an absolute power of disposition either by sale or devise clearly and unmistakably implied. Therefore, according to the adjudged cases, *the limitation over to the nieces of the testator is void.*"

Stating that the English cases followed the above rule, and that the American cases are to the same effect, it furnished several examples. In *Bowen* v. *Dean*, 110 Mass. 432, a man devised all his estate, real and personal, to his wife "to hold to her and her assigns" but should she "die intestate and seized of any portion of said estate at the time

of her death," then over. The wife took possession of the land and died having made a will by which she devised and bequeathed all her estate, real and personal. This court said:

> "It was held, that the will of the husband gave the wife, by necessary implication, an absolute power of disposal, either by deed or will, and this power having been fully executed by her will, nothing remained upon which the devise over in the will of her husband could operate."

This court stated the rule as laid down by Chancellor Kent:

> "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies *possessed* of the property without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should *leave,* or without *selling* or devising the same; in all such cases the remainder over is void as a remainder because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given, or necessarily implied by the will. *4 Kent's Com. 271.*"

Referring to the will of Carusi, this Court further said:

> "The words do not raise any trust in Samuel. He is not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed upon him. *But even if the will had contained an express request that Samuel should convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives Samuel Carusi the absolute power of disposal.*" (Italics supplied.)

It then added:

> "In Knight v. Knight, 3 Beavan, 148, it was said by the Master of the Rolls (Lord Langdale):
>
> 'If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject matter from the wish or request, * * * it has been held that no trust was created.' "

Further, the rule is thus stated by Mr. Justice Story in his *Commentaries on Equity Jurisprudence*, Sec. 1070:

> " 'When the objects of the supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, *whenever the prior dispositions of the property import absolute and uncontrollable ownership*, in all such cases courts of equity will not create a trust from words of this character.' " (Italics supplied.)

In *Potter* v. *Couch*, 141 U. S. 296, a suit to construe a will containing a restriction against alienation by the brother and nephew of decedent of the share devised in fee to them, this court said:

> "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Citing cases. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. Howard v. Carusi, 109 U. S. 725, and cases cited. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee,

> is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that period of time of the inherent power of alienation. Citing cases."

And quoting the Supreme Court of Illinois in *Steib* v. *Whitehead,* 111 Ill. 247-251, the court said:

> "We fully recognize the general proposition that one cannot make an absolute gift or other disposition of property, particularly of an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself, for that would be to give and not to give, in the same breath. Nor do we at all question the general principle that, upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred."

In *Roberts* v. *Lewis,* 153 U. S. 367, the testator's will provided:

> "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain hers, with full power, right and authority to dispose of the same * * * so long as she shall remain my widow, upon the express condition however, that if she should marry again, then it is my will that all of the estate herein bequeathed or whatever may remain shall go to my surviving children."

This court said:

> "The testator's primary object manifestly was to provide for his widow. He begins by giving her 'all my estate, real and personal' which of itself would carry a fee unless restricted by other words." * * *
>
> "That the power was intended to be unlimited in this respect appears, even more distinctly, by the terms of

the next clause by which, if she should marry again, the testator declared it is his will that 'all of the estate herein bequeathed, or whatever may remain, should go' to his surviving children. By not using the technical word 'remainder' or making the devise over include the entire estate at all events, but carefully adding after the words 'all the estate herein bequeathed' the alternative 'or whatever may remain' (which would otherwise have no meaning) he clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow and there is nothing * * * to show that the power of the widow is less absolute over the real estate than over the personal property.

It is unnecessary to express a positive opinion upon the question whether, under this will, the widow took an estate in fee for if she took a less estate with power to convey in fee, the result of the case and the answers to the questions certified must be the same as if she took an estate in fee for herself."

And it distinguished and limited the effect of the rule in *Smith* v. *Bell*, 6 Peters 68, 31 U. S. 774, where the testator's entire will was written in one sentence, saying:

"In Smith v. Bell, the testator bequeathed 'all his personal estate' consisting principally of slaves, to his wife, 'to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use of' his son; and the decision was that the wife took a life estate only, and the son a vested remainder. The wife had made no conveyance of the property; the words of the gift were the technical ones 'the remainder of my estate' appropriately designating the whole estate after the wife's death; and the court distinctly intimated that, if the will were construed as giving the wife 'the power to sell or consume the whole personal estate during her life' a gift over of 'what remains at her death' would be 'totally incompatible' and 'void for uncertainty' ".

This court laid down the rule in *Smith* v. *Bell, supra,* "that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law."

Applying this rule in accordance with the decisions above referred to, the trial court correctly found that the true intent of the will of Inez W. Fulton was to bequeath her entire estate unconditionally to her two sisters, and that the provisions contained in the will as to St. Matthew's P. E. Church, the Grenfell Mission and the Home for Incurables are "expressions of a wish of the testatrix only and do not impose a charge in favor of the said institutions" and

> "(c) That the provisions contained in said will for the benefit of the City Trust of Philadelphia, Pennsylvania and Girard College or Jefferson College are expressions of a desire of the testatrix that her sisters should make provision therefor in their respective wills and do not impose any charge in favor of said Trust or Colleges; that *in the alternative,* the provisions for said Trust and Colleges constitute an *attempted limitation over* of a remainder, following two vested and absolute estates in the sisters of the decedent, which is invalid and void." Conclusions of Law (R. 26). (Italics supplied.)

Totally disregarding the decisions of this court and the rule of law therein enunciated, the court below, criticizing the trial court stated:

> "In the present case, the trial court applied to the word 'unconditionally', which testatrix used in the earlier paragraph of her will, the technical legal meaning of that word, which would be used customarily by legal purists and held, in effect, that as the later language of the will was inconsistent therewith, the later used language must be reconciled accordingly, by interpreting it to constitute merely a suggestion to the sisters, or in the alternative her provision for a trust

[being an attempted remainder over] must be held invalid and void, and the later used language, entirely inoperative. We think this constituted a misapplication of the applicable rules. It failed to consider the whole instrument for the purpose of determining the true intent of the testatrix, and it failed to take account of the fact that later paragraphs of the will clearly indicate an intention to create a charitable trust, in no way dependent upon the power or pleasure of the two sisters. * * * On the contrary, it is apparent that the trust was a major project in the mind of the testatrix, of an entirely different character than the provision for gifts to named beneficiaries. These gifts she expected her sisters to make during their lifetimes. The provision for a charitable trust, on the other hand, was her own clearly expressed act, to take effect after the death of her sisters, and upon such part of the estate as remained after the death of those sisters." (R. 38)

In construing the will, the trial court said:

"* * * But taking the will itself, evidently written out by the woman herself in her own handwriting, and the codicil to it, likewise written out in her own handwriting—taking the will itself, the testatrix says, 'I bequeath unconditionally all that I own and possess to my two sisters.' And that covers the quantity of the estate. The estate is all personal property * * * That shows the quantity of the estate was to be all that she possessed—'all that I own and possess.' The two sisters were to have the entire quantity of her estate without any conditions—no strings, no limitations, no qualifications attached to it. Then she adds, after she has done that, 'asking them to make the following gifts.' "

And as to the precatory words, "asking them to make the following gifts," the court said,

"The court holds that without doubt that mere expression 'asking them to make the following gifts,' would

not constitute those three pecuniary legacies as being legacies from the testatrix to those three beneficiaries, but it is merely a request that having given all that she owned and possessed to her two sisters, then if they will make those gifts to the three mentioned institutions * * * could not the will be construed that she wanted them to make those gifts while they lived, and then that after their death she asked that the bequest be made to Girard College. That is not altogether inconsistent because that is a possible construction that could be placed upon it to harmonize the will * * * If they did not see fit to do it, the City Trusts of Philadelphia, Girard College and Jefferson College are in the same position as St. Matthews' Church, the Grenfell Association of America, and the Home for Incurables. That is a construction of the will which you may say is a little stretched, but that would account for everything that is in the will. That would seem to the court to harmonize everything in the will and give some meaning to it but it would still be the actual estate, all that the testatrix left to go unconditionally and absolutely to the two sisters.

If that is not the construction to be put upon this will, then clearly there is a contradiction. The word 'unconditionally' cannot be harmonized with the whole estate after the death of the two sisters, being left in trust and giving the two sisters only a life estate. There is no word throughout this whole will that says, 'I am leaving this property to my two sisters just for life.' There is no word from which you can imply that expressly. So the court holds that even if you put a construction upon it that the first construction I have stated is not the correct one, then you have got to say that the latter part of the will in regard to Girard College is in contradiction of the former part of the will, and that where an entire estate is given in fee simple to her sisters in the first part of the will, then you cannot restrict or limit or do away with that by anything in the subsequent part of the will. This is not like some of the wills referred to by counsel. It does not talk about any residuary clause. It does not talk about what is to be done after-

wards; but if you put the interpretation on it that she wants the following gifts made and she wants the following expenses paid, that is, asking the two sisters to provide that the rest of the estate go to these institutions, that is the interpretations the court puts upon this will and I will sign an order to that effect.

* * * Even if that be not the correct interpretation, then the second interpretation of the will is that the unconditional bequests leave nothing for either of these specific gifts mentioned, including the scholarship gift. The scholarship gift is to be construed like the others. If it is not, it is in contradiction of the first part of the will."

Testatrix does not say that after the death of her sisters she gives her estate or the remainder of her estate to the Board of City Trusts but says that "the estate is to be placed" indicating that this was also one of the gifts that she requested but did not require her sisters should make. Contrary to the view of the court below that the later paragraphs of the will clearly intended to create a charitable trust, "in no way dependent upon the power or pleasure of the two sisters", the fact is that the creation of the trust rested entirely within the control of her sisters. Query, who else except her sisters could *place* the estate? Throughout the entire will nothing is said about the estate being given to the sisters for life—nothing whatever about income for life only—no trustee is appointed; only an executrix whose functions would by law cease as soon as she had administered the estate and it had been awarded to the two sisters. Further, only in the remotest contingency could both of her sisters die at the same time. Testatrix made no gift over to the survivor upon the death of one, nor any provision for then giving the deceased sister's share to the Board of City Trusts. One sister predeceased the other by approximately two years. Where then, would the one-half share of the first deceased sister vest until the death of both, pend-

ing the death of the second sister? These difficulties are easily resolved if the will is construed as it was by the trial court, viz., that testatrix merely *asked* her two sisters to make this provision to the Board of City Trusts the same as she did the other gifts. Indisputably, the testatrix's primary object was to vest an absolute estate in her sisters.

In comparing the statement of the court below that a technical legal meaning *used customarily by legal purists* was given to the word "unconditionally", it is to be noted that the trial court stated:

> "The two sisters were to have the entire quantity of her estate without any conditions—no strings, no limitations, no qualifications attached to it."

This is hardly a meaning or definition which would fall within the category of legal purism. In both courts petitioners have contended that the word "unconditionally" should be applied in the normal grammatical acceptation of the word and in their brief in the court below emphasized it by stating: "Webster's International Dictionary defines 'unconditional' as an adjective and 'unconditionally' as an adverb, thusly,

> 'Not conditional, limited, or conditioned; made without conditions; absolute, unreserved; as an unconditional surrender,
>
> O, pass not Lord, an absolute decree
> Or bind thy sentence unconditional.
>
> Dryden.' "

The words "unconditional" and "unconditionally" appear to have no recognized legal technical meaning as they are not defined in either Black's Law Dictionary or Bouvier's Law Dictionary. The meaning of the word "unconditionally" is so universally recognized as to admit of but one

broad definition to layman and purist alike. Webster cites "an unconditional surrender" as an example of the meaning of the word. The meaning of the sentence, "To my sisters * * * I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts." is unmistakable. Certainly in the instant case the trial court did not resort to a narrow, strained or legal technical meaning to define it. In fact, it appears that the court below has itself distorted the universally recognized meaning of the word in controversy. Testatrix was an educated woman—she was careful in the selection of her words in describing the bequest to her sisters, and expressed herself in such clear, concise and unambiguous words that they could not have been improved upon by a grammarian. Testamentary intention cannot be more positively or directly expressed than to bequeath to one "unconditionally, all that I own and possess" and the continuation of the sentence, "asking them to make the following gifts" does not lessen or limit it in any way, in fact, it lends emphasis to the absoluteness of the estate conveyed by recognizing that only through gifts by the sisters can anyone else share in the estate.

Words of Inheritance Not Necessary to Create Fee Simple Estate.

Testatrix conveyed to her two sisters an absolute estate under the laws of the District of Columbia without regard to the word "unconditionally". *1940 Code of Laws, D. C., Title 45, Sec. 201,* provides:

> "No words of inheritance shall be necessary in a deed or will to create a fee simple estate; but every conveyance or devise of real estate shall be construed and held to pass a fee simple estate or other entire estate of the grantor or testator, unless a con-

trary intention shall appear by express terms or be necessarily implied therein."

Therefore, the natural assumption is that she was taking precautions to remove any doubt of the extent and nature of the estate she wanted her sisters to have.

The trial court construed the will as it found it—it did not undertake to improve upon the will, or rewrite it, or resort to conjecture by charging that testatrix used inept words to describe the bequest to her sisters.

Decision of the Court Below Is Contrary to Great Weight of Authority.

Applying the well established principle of law that where an absolute estate is given in express terms in one clause of a will, ambiguous words later used cannot cut down the estate to the first takers, we find:

> "In construing a will the court has no power to make a will for the testator or to attempt to improve upon the will which testator has actually made. The court cannot begin by inferring testator's intentions, and then construe the will so as to give effect to this intention, however probable it may be, nor can it rewrite the will, in whole or in part to conform to such presumed intention. If testator has omitted to provide for the state of affairs which actually exists, the court cannot make the assumption that testator would probably have had a given intention if he had thought of the state of facts which actually existed, and give effect to such probable intention." *Page on Wills*, Vol. 2, Sec. 919, p. 812.

The court below in holding that the trial court applied to the word "unconditionally" the "legal technical meaning of that word, which would be used customarily by legal purists" when as a matter of fact the meaning of the word applied by said court is almost precisely that which is

found in Webster's International Dictionary, supra, proceeds to almost completely rewrite the will of testatrix. First it states that the clause "To my sisters * * * I bequeath, unconditionally, all that I own and possess," *purported* to bequeath unconditionally all of her property asking them to make three gifts to named beneficiaries. This clause did not *purport* to convey; it did convey in most clear, precise and unambiguous language an absolute estate to the two sisters. The court below then states that as the clause in the will, following the appointment of the sisters as executrixes, "after the death of" the sisters "the estate is to be placed in the City Trust of Philadelphia, Pa., * * *" is obviously inconsistent and contradictory with the first clause of the will, it became necessary to remove the inconsistency and to resolve the contradiction by discovering the intent of the testatrix from the whole instrument, and in doing so, "the language first used has no greater significance than the language later used." In resorting to this construction, the court below overlooked or disregarded the decision of this Court in *Howard* v. *Carusi*, supra, where it is stated:

> "The rule is well established that, although generally an estate may be devised to one in fee simple or fee tail, with limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void."

And it likewise disregarded the well established rule of construction that:

Testamentary Intention Is Presumed to Be in Accordance With Law.

> "It is said that it will ordinarily be presumed, in construing a will, that the testator is acquainted with the rules of law, and that he intended to comply with them

accordingly. If two constructions of a will are reasonably possible, and one of these constructions is consistent with the law, and the other is inconsistent, the presumption that the testator intended to comply with the law will compel that construction which is consistent with the law to be adopted. The result is correct, although the assumption that testator actually knows the law seems fictious. It is said that testator will be presumed to know the limits imposed by law upon his testamentary power, and to strive to comply with those limits. If one construction of the will will cause it to violate the rules against perpetuities or against restraints on alienation, and another construction will make it comply with those rules, the construction which makes it comply will be preferred." *Page on Wills*, Vol. 2, Sec. 925, p. 840.

Woerner on Wills, states the rule more emphatically:

"It is usually held, in accordance with the prevalence of authorities, that a valid executory devise cannot, at common law, be limited after a fee upon the contingency of the non-execution of an absolute disposing power vested in the first taker; and that such a limitation over is void in its creation. It is difficult to understand why this should be more than a rule of construction. *Obviously, the limitation of a remainder upon a fee is inconsistent, and it would follow that, if the creation of a fee simple estate in the first taker is the deliberate intention of the testator, the limitation over is void as repugnant thereto.*" *Woerner on Wills*, Vol. 3, Sec. 439, p. 1483. (Italics supplied.)

"If one provision of the will shows testator's paramount intent and another provision shows a minor or subsidiary intent, the courts regularly give effect to the paramount intent." *Page on Wills*, Vol. 3, Sec. 1113, p. 358.

* * * "If the words which create the fee are clear it [estate in fee] will not be cut down to a lesser estate by words which are vague, or from which an intention to cut down the fee can be drawn only by inference. *Even if the words show an intent to cut the fee down,*

effect will not be given thereto if the intent to give the fee is the paramount intent. It is said that, if both provisions can not stand together, the prior provision, which will give a fee will prevail over a subsequent provision which attempts to limit it." P. 360. (Italics supplied.)

In Vol. 3, Sec. 1123, p. 385, Page lays down a rule which has direct application to the case at bar:

"A remainder over after a gift in fee simple upon an absolute gift of personal property was void at common law and this is still in force except where specifically modified by statute. This rule applies in cases in which the testator has attempted to create a life estate with an unlimited power of disposition but such an estate is nevertheless held to be a fee simple. If it is held to be a fee a gift over of what is not disposed of is void. If the fee is *an unconditional estate*, testator's attempt to restrict the devisee's power of alienation is objectionable and his attempt to prescribe a course of succession or descent different from that which the law prescribes is an attempt to create a new kind of estate, which cannot be done." (Italics supplied.)

Thompson on Construction of Wills states a rule of construction to be,

"In case of ambiguity in the will, the law favors such construction as will be advantageous to heirs at law and next of kin in preference to strangers, or persons not so closely related to the testator." Sec. 67, p. 109,

and,

"In case of doubt, the construction of a will should be in favor of the first taker rather than the second taker. This is because of the fact that the law looks with disfavor on a construction that will tie up property, and the presumption is that the first taker is the testator's favorite." P. 117.

Ruling Case Law, vol. 28, sec. 191, states the rule to be

> "In case of doubt the construction of a will should be in favor of the first taker rather than of the second taker. This is due to the fact that it is contrary to the policy of the law to tie up property and because the first taker in a will is presumed to be the favorite of the testator."

The court below committed reversible error in construing the will of testatrix upon the theory that because there was an inconsistency or contradiction present, that "the language first used has no greater significance than the language later used." Proceeding upon this theory it stated, "if explanatory and qualifying later language indicated that a non-technical meaning was intended, then the literal or technical meaning should be disregarded and the intent of the testator prevail."

Referring to the "technical legal meaning of that word", "unconditionally", this Court in *Travers* v. *Reinhardt*, 205 U. S. 423, 431, quoting Lord Chancellor Eldon in *Crooks* v. *DeVendes*, 9 Ves. 197, 205, said:

> "Where words have once got a clear, settled, legal meaning, it is very dangerous to conjecture against that, upon no better foundation than simply that it is improbable the testator could have meant to do one thing, by one set of words, having done another thing, using other words, as to persons in the same degree of relation to him."

The Decision of the Court Below Is in Conflict with Its Own Decisions.

In holding that the will should be interpreted to express the intent of the testatrix (1) that her sisters should enjoy the property only so long as they lived, and (2) that a trust was created of such remainder as should exist thereafter,

the court below has not only disregarded decisions of this court and the great weight of authority, but has disregarded its own decisions, of which it complained that the trial court did not properly apply.

Although the provision for a charitable trust may have been a "major project in the mind of testatrix" it cannot be maintained that it was the paramount intent in the mind of the testatrix after she had given "To my sisters, Mary E. Graff * * * and Annie W. Chieves * * * I bequeath, unconditionally, all that I own and possess, * * *."

As far back as 1877 the court below in *St. John's Mite Association* v. *Buchly*, 5th Mackey, 16 D. C. 406, decided that although two clauses in a will are inconsistent with each other, if enough can be gathered from the rest of the will to show which of the two clauses express the testator's intention, the will is properly construed in accordance with the intention thus shown. The question in that case was whether the will intended money to be paid by the Masonic Mutual Relief Association at testator's death should constitute any part of the life estate of his sister, or should be paid to his executors. The court below said:

> "We are thus confronted with a case in which everything tends to show that the testator first provides for his own blood, which a corporation, however meritorious, is not; and in analogy to the principle upon which we say that a will, all the expressions of which go in the direction of his own people first, should be sustained as so declaring, rather than as giving property to strangers who are created participants by his own bounty."

In *Montgomery* v. *Brown*, 25 App. D. C. 490 (1905), testator devised all his real estate to his wife during her life with power to mortgage should her circumstances become such as to justify it. Certain specific bequests were

made. The will contained the following clauses which became the subject of construction:

> "I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this my will. * * *
>
> "At the death of my wife, Emma V. Montgomery, all my property—real, personal and mixed—shall revert to my brother, Winfield Scott Montgomery, and his heirs, forever."

The executors collected the life insurance amounting to $5,000 which was taken by the widow and $4,800 deposited in several local banks in her name. Shortly thereafter she died intestate leaving as her heirs at law and next of kin, Richard Brown, one of the appellees who was appointed administrator of her estate. The inventory amounted to about $7,000. Among the items were three notes amounting to about $4,500 secured by deeds of trust, which were asserted to have been purchased with the life insurance funds. While Brown's petition for appointment as Administrator was pending, Winfield Scott Montgomery filed an intervening petition claiming that the notes had been purchased with the insurance money and *that they, as well as all other personal property* which the widow received under the will of her husband passed at her death to him.

The court below said that the state of facts presented two questions for consideration:

> "The first is as to whether the insurance money was invested in the notes referred to; * * * it is, in our opinion of little consequence, for the reason that if Mrs. Montgomery only took a life interest in the insurance money, her estate would, in any event, be answerable for the full amount.
>
> The second question is the important one, and that is as to whether Emma V. Montgomery's interest in the insurance money was absolute, or only a life interest therein."

Considering the will the court below said:

> "A reading of the will clearly shows that it was the intention of the testator to provide for his wife a home, and, according to the measure of his means, an ample maintenance. * * * He also gave her his life insurance without any words of limitation. Had he intended to give her only a life interest in it, or only so much as might be necessary for her maintenance it would have been natural for him to so state and to have qualified the bequest as he had limited her interest in his real estate in the preceding clause of the will. * * *"

The court below quoted an excerpt from *Howard* v. *Carusi*, supra, holding that where absolute power of disposal was given in express and unequivocal terms, or clearly and unmistakably implied, to the first taker, the remainder over was void, and then quoting the trial court said that "it would be most unusual, indeed, for a testator in disposing of his life insurance policy * * * to say to his wife that he did not mean that she should use the insurance money, but only that she should invest it and use the income * * *".

> "The clause of the will upon which the complainant relies—namely, 'At the death of my wife, Emma V. Montgomery, all of my propery—real, personal, and mixed—shall revert to my brother, Winfield Scott Montgomery, and his heirs forever'—is in the nature simply of a residuary disposition. The clause was necessary in order to dispose of the fee in the real estate which he had simply vested the widow with a life estate, but beyond this it is only to be treated as a general clause."

Therefore the rule above stated, i. e., that where absolute power of disposal is given in express and unequivocal terms or clearly or unmistakably implied to the first taker under a will, a remainder over is void, is particularly applicable here. The estate of testatrix consisted entirely of personal

property and paraphrasing the court below in *Montgomery* v. *Brown*, supra, it would be most unusual for a testatrix in bequeathing to her sisters everything that she owned and possessed unconditionally to say that she meant they could not do as they pleased with it—transmit it by will as well as by gifts inter vivos if they say fit to do so. Yet the court below states that the intention was to create a charitable trust "in no way dependent upon the power or pleasure of the two sisters". Stating that testatrix *expected* her sisters to make gifts to the three named beneficiaries, which is an assumption, as she merely "asked" them to do so, the court below then states that "the provision for a charitable trust on the other hand was her own clearly expressed act, to take effect after the death of the sisters, and upon such part of the estate as remained "after the death of Mary E. Graff and Annie W. Chieves." It totally disregards the fact that *her own clearly expressed act* was to bequeath to her sisters an absolute and unconditional estate. It is impossible to read any ambiguity into the first clause of the will.

> "Words and expressions used in a will are to be construed naturally and to be taken in their ordinary, proper and common accentuation unless it clearly appears in the will that they are used in a different sense." *Mayo* v. *Wheadon*, 47 App. D. C. 138.

In *Presbrey* v. *Simpson*, 53 App. D. C. 358, 290 F. 333, the court had before it for construction a will containing the clause, "I commit my body to dust from whence it came —my soul unto God who gave it—my property unto my wife." It held she took a fee simple estate. The court said:

> "It is contended that the word 'commit' is insufficient to constitute an absolute gift of property and hence that the testator died intestate as to one-half the remainder of his estate. * * *

> Our inquiry is, not what 'commit' may mean, but what, as used by the testator in this instrument, it was intended to mean.
>
> The interpretation we have placed upon the word brings into harmony the various provisions of the will, and gives force and effect to the abiding and unconditional intention of the testator."

Sherman v. *American Security & Trust Company*, 57 App. D. C. 273, 20 F. 2, 446, is a case somewhat analogous to the instant case. Lafayette College, Easton, Pennsylvania, was left a trust fund and a dispute ensued as to whether a certain percentage of income should pass into corpus each year for those claiming it or whether it should be paid to the college. The decision was against the college and the court below said:

> "It is unnecessary to dwell upon the elementary principles pertinent to the construction of wills, further than to suggest that, if the present case were sufficiently close to invade the realm of doubt, it would be the duty of the court to resolve the doubt in favor of the kindred of the testator rather than the college. This rule of construction is concisely stated in Schouler on Wills, (5th Ed.) Sec. 479, as follows: 'It may be safely laid down that, of two equally probable interpretations of a will, that shall be adopted which prefers the family and kindred of testator to utter strangers.' "

In reversing the trial court, the court below stated that the conclusion which it reached was fortified by "the fact that charitable trusts are favored in the law and the construction of all instruments where they are concerned is liberal in their behalf". This is subject to the clear exception found in *Ould* v. *Washington Hospital for Foundlings*, 95 U. S. 303, 313, cited to support the above statement, where this court said:

> "Charitable uses are favorites with courts of equity.
> * * *

> But a gift may be made to a charity not in esse at the time—to come into existence at some uncertain time in the future, *provided* there is no gift of the property in the first instance, or perpetuity in a prior taker. *Perry on Trusts,* Sec. 736."

The court below then states "also, the clearly expressed intent of the testatrix to create a charitable trust should prevail over her inept use of words to describe her bequests to the sisters." Webster's International Dictionary defines "inept" as follows: (1) Not apt or fit; unfit; unsuitable; improper; unbecoming; (2) Silly; useless; nonsensical; absurd; foolish. Query, what is there about the clause "to my sisters, (naming them) I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts." that is unsuitable or improper?

In *Evans* v. *Ockershausen,* 60 App. D. C. 285, 100 F. 2, 695, the court below said, in construing the will before it:

> "As the language in question is free from ambiguity, we are not permitted to construe it and thereby substitute an entirely different meaning from the language set forth in the will. Travers v. Reinhardt, 25 App. D. C. 567, affirmed 205 U. S. 423, 27 S. Ct. 563, L. Ed. 865; Mayo v. Wheadon, 47 App. D. C. 138, Rady v. Staiars, supra, Wallace v. Wallace, supra. *It is not for us to determine that the testator would have written differently upon this point had his attention been called to the suggested change.* Justice Holmes in Eaton v. Brown, 193 U. S. 411, 413, 24 S. Ct. 487, 48 L. Ed. 730, used very apt language in respect of interpreting a will when he said:
>
> 'There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testator would have said if her attention had been directed to a particular point for what she has said in fact.' Italics supplied, (p. 706)."

The most recent exposition of the law on attempted limitation over after vesting an absolute estate to the first takers is found in the Supreme Court of Appeals of Virginia. In *Rule* v. *First National Bank of Clifton Forge*, 182 Va. 227, 28 S. E. 2, 709, January 24, 1944, that court had under consideration a will where it was contended that testator devised a life estate only to his widow with remainder over to his brother and sister. In holding that where a person has been devised absolute dominion over real and personal property followed by a gift over to another, an absolute and fee simple estate passes to the first taker and the gift over is void for uncertainty, the court said:

> "The cardinal rule of construction is that the intention of the testator must be determined from what he actually said and not from what it may be supposed he intended to say. If the meaning of the language used by the testator is clear, the will needs no interpretation. It speaks for itself.
>
> Under well settled rules of construction in this jurisdiction, the will as presented is not ambiguous. Since the decision in May v. Joynes, 1871, 20 Grat. 692, 61 Va. 692, it has been consistently held that, where a person is given absolute dominion over property, followed by a gift to another 'of what remains undisposed of at her death' or 'such part as may not be appropriated,' a fee simple in real estate and absolute estate in personalty passes to the first taker. The gift over is void for uncertainty. Many of the cases so holding were reviewed by Judge Saunders in Davis v. Kendall, 130 Va. 175, 107 S. E. 751. However, in Davis v. Kendall, the distinction was pointed out between the provisions of a will devising property to the first taker for life with a power of appointment of the reversion and the provisions of the will giving the first taker absolute dominion over the property either for support and maintenance or for purposes not stated. It was said, 130 Va. at page 195, 107 S. E. at page 757:

'In other cases the fee is given directly or by implication, though the purpose thereof is not stated; but the fee, in terms or by necessary implication, is lodged in the first taker without restrictions, and may be simply and readily used by him for support, or for any other purpose. The donee in many cases is not restricted to a life estate, for the manifest reason that it is clearly the intention of the donor for the fee to pass. Hence this intent is made effective by the court.

'The estate conveyed being the testator's his will is the law of the court, unless that will be against the law of the land.' Hence, when he plainly intends a fee, even though the testator's expression is inartificial, a fee is given, but his intent to limit a remainder on a fee is avoided, not that the court fails to perceive the intent, but because it is against the law.'' Hunter v. Hicks, 109 Va. 615, 64 S. E. 988; Conrad v. Conrad's Ex'r, 123 Va. 711, 97 S. E. 336, and cases cited in note on pages 722, and 340 respectively. Among the more recent cases are * * *.''

After stating the rule as aforesaid the Court further said:

''Construing the language used by the testator in the will under consideration, in the light of the principles applied by the long line of cases cited, we find no doubt or ambiguity. The testator, in express terms, gave his wife all his property 'with full power to dispose of same' without restriction. 'The power of absolute disposition is the eminent quality of absolute property'. He who has absolute power over an estate thereby acquires the absolute property. Hence the conclusion of the court, supra, with respect to the character of the estate taken by the devisee, merely makes effective the manifest primary intent of the testator. But the secondary intent of the testator to dispose of any portion of the fee unused, or unappropriated by the devisee for her purposes, is frustrated by the court, which holds that the limitation over of whatever remains at the death of the wife is inconsistent with, and repugnant to, the fee simple, and therefore void for uncertainty.

Davis v. Kendall, supra, 130 Va. at pages 181, 182, 107 S. E. at page 752."

The law is so well settled that where an absolute estate is conveyed in express terms or clearly and unmistakably implied to the first taker under a will, an attempted limitation over of a remainder is void, that no further elucidation is necessary.

In the instant case the court below, reversing the trial court, and holding that a trust fund was created of the remainder for the benefit of one charity, has produced the anomalous result of depriving thirteen charitable institutions from receiving that part of the estate of testatrix which one of the sisters, Annie W. Chieves, took under the "unconditional" bequest.

Conclusion.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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